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In the Supreme Court of the United States

October Term, 1963

No. 452

ALLIED VAN LINES, a corporation,
Petitioner,

vs.

CARL G. ZIMMERMAN,
Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari

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PREFATORY NOTE

Petitioner and Respondent are herein designated by name, or as carrier and shipper, respectively. References to the brief of petitioner seeking certiorari are abbreviated as Pet. Br. References to the opinion of the Court of Appeals are to the pages in Appendix A to the brief of petitioner.

INTRODUCTION

Allied Van Lines' petition for certiorari contains an astounding array of information and conjecture having almost nothing to do with the record and issues of this case. Indeed, it would seem that Allied in preparing its petition may have confused this action with some other case.

Although Allied's approach generates more confusion than clarity, the shipper will not compound the situation

by presenting a separate statement of the questions. It is sufficient to state that the respondent does not consider the questions presented by Allied (Pet. Br. 2-3) to be real issues arising from the record. On the contrary, they are mainly abstract and argumentative interpretations of the Ninth Circuit opinion.

The shipper agrees generally with the facts giving rise to this action as set forth in petitioner's brief. (Pet. Br. 3-6) However, one aspect of Allied's statement of the case must be clarified. The Court of Appeals *did not* hold that the shipper was entitled to recover full value of each item which was damaged or destroyed as Allied's brief blatantly mistates. (Pet. Br. 6) The Court of Appeals simply held that the formula contained in the bill of lading issued by Allied to the shipper governed liability as to each article in the shipment; that in no event could the shipper recover more than the formula liability for loss to any article—an amount always less than the actual value of the article; and that the formula recovery was $20,000.00, that being the declared value of the shipment *in which all items were damaged or destroyed.** (See Pet. Br. 22) The significance of this point cannot be understated.

The shipper urges that the Court initially examine the briefs filed in the Court of Appeals, and study Section 1(b) of the bill of lading issued by Allied Van Lines (See Pet. Br. 18-19), and the provisions of 49 U.S.C. § 20(11). (Pet. Br. 20) Both the bill of lading and statute are complex, and some understanding of each is absolutely essential to consideration of the questions and arguments in this matter.

*The mathematical aspect of computing liability is discussed at length in Appellant's Opening Brief, p. 14, and Appellee's Brief, p. 9, in the Court of Appeals.

ARGUMENT

The argument made by Allied in support of its petition for certiorari involves two main points: First, Allied urges that the Court should construe 49 U.S.C. § 20(11) in relation to the peculiar facts here involved—primarily because of the imagined ramifications which will follow from the Court of Appeals' opinion as interpreted by Allied. Second, Allied contends that the Court of Appeals improperly determined the meaning of the limitation of liability clause in Allied's bill of lading.

The first argument involves more imagination than merit. The second argument is one of minimal public and private interest with which this Court should not be concerned as a basis for granting certiorari.

I. It Is Neither Necessary nor Appropriate for the Court to Grant Certiorari in This Case for the Purpose of Construing 49 U.S.C. § 20(11).

A. The Meaning of 49 U.S.C. § 20(11) in Relation to Allied's Bill of Lading Is Not an Essential Matter for Determination in This Case.

Allied has urged (Pet. Br. 6) that the Court grant certiorari herein because no federal court has ever considered the meaning of 49 U.S.C. § 20(11) in relation to Released Rates Orders issued by the Interstate Commerce Commission.* Concededly, the meaning of the statute has never been passed upon in any federal decision; and as stated by Allied, *H. R. Mallison & Co. v. Barrett*, 215 App. Div. 524, 213 N.Y.S. 652 (1926), is "the only case even remotely in point." (Pet. Br. 7)

*The portion of 49 U.S.C. § 20(11) related to this matter is commonly known as the Second Cummins Amendment, 39 Stat. 441 (1916), which allows a carrier to limit common law liability for loss to a shipment concerning which the carrier is authorized by the Interstate Commerce Commission to establish rates dependent on the declared value of the shipment.

However, it must be borne in mind that the Court of Appeals resolved this case without making any direct interpretation of the Second Cummins Amendment, and without even remotely construing that statute. In effect, the Court of Appeals found—by implication—that the limitation clause of Allied's bill of lading was consistent with 49 U.S.C. § 20(11).* For all practical purposes, that holding was in Allied's favor, and Allied is in no position to have this Court modify, explain, or elaborate on the ruling in that regard.

Thus, the correct meaning of 49 U.S.C. § 20(11) is not an essential issue which this Court should feel obligated to resolve. While, as an abstract matter, the shipper is not in full agreement with the implied approval given Allied's bill of lading by the Court of Appeals, this Court should not now consider, on an abstract basis, the validity of the bill of lading under 49 U.S.C. § 20(11).

B. The Court of Appeals Decisions Did Not Render 49 U.S.C. § 20(11) Nugatory or Meaningless in Any Respect.

Allied conceives of the Ninth Circuit decision as some type of pandora's box which has opened the transportation industry to discrimination and unfair competition in rate charges. (See Pet. Br. 8, et seq.) Respondent is at a loss to understand the process of mystic extrapolation upon which Allied has founded this contention.

Apparently, Allied believes that the lower court decision somehow usurped the rate-making power granted the ICC by 49 U.S.C. § 20(11). This is not correct. The decision

*The shipper urged in the Court of Appeals that Section 1(b) of Allied's bill of lading was inconsistent with 49 U.S.C. § 20(11). (See Appellant's Opening Brief, p. 6-13, in the Court of Appeals.) The Ninth Circuit refused to consider this argument, and limited its opinion to a construction of Allied's bill of lading. (See Pet. Br. 20.)

merely construed a specific limitation clause (See Pet. Br. 22) and applied that clause to a specific fact situation. The decision in no way altered the powers of the ICC to establish rates and related liabilities for motor carriers.

There is nothing in the record to show how the ICC established the rate structure under which Allied operates.* There is nothing to show that the rate charged the shipper in this case was not made dependent on the declared value of the shipment, pursuant to 49 U.S.C. § 20(11). There is nothing before this Court to indicate that the Court of Appeals has done anything more than pass upon the meaning of a single limitation of liability clause. It cannot follow from this that the power of the ICC under 49 U.S.C. § 20 (11) has been rendered meaningless, or abrogated in any way.

Obviously, the Interstate Commerce Commission has authority pursuant to 49 U.S.C. § 20(11) to make whatever Released Rates Orders as may be appropriate to more clearly define carrier liability—if necessary in the light of the Court of Appeals' decision. If Allied is so vitally concerned about potential liability, it would be more appropriate to submit the problem to the ICC than to attempt to convert this Court into a rate-making body to consider a single factual situation involving a single carrier.

Further, the Allied contention (Pet. Br. 10) that the decision below creates some conflict between 49 U.S.C. § 20(11) and 49 U.S.C. § 316(d) is specious. The prohibition of 49 U.S.C. § 316(d) against rate discrimination or preference is not abrogated or affected in any way by the opinion of the Court of Appeals.

*Released Rates Order No. MC-309, referred to by Allied throughout its brief, and set forth in Appendix C (Pet. Br. 31a-35a), is *not* a part of the record in this case.

The basic premise of Allied's claim of conflict is that the shipper in this case recovered 26 26 of his cargo loss and damage after paying an increased rate charge based upon 20 46 of the value of the shipment. Allied claims that carriers can now circumvent 49 U.S.C. § 316(d) with impunity by allowing shippers to undervalue cargo, pay low rates, and collect for damage to freight in excess of that for which they have paid. This is pure nonsense.

The shipper in this case paid a rate based on a declared value of $20,000.00 The rate was in no way related to actual value nor was it based upon protection of 20 46 of the shipment. The shipper did not receive any benefit of $42.00 in rate (Pet. Br. 11) by recovery of the declared value.* Allied actually conceives of the establishment of a rate dependent on and related to the loss of a shipment before the loss occurs and the amount of loss is known. This nonsequiter is not only inconsistent with every concept of logic and mathematics known to man, it is contrary to the provision of Allied's own bill of lading establishing the rate as 50c per $100.00 of declared value.

Certainly, no carrier can discriminate in rates to shippers by following Allied's theory. All shipping rates must still be dependent on declared value in accordance with 49 U.S.C. § 20(11). Claims must be paid consistent with limitations established by the ICC, and no carrier could violate 49 U.S.C. §316(d) by gratuitously paying shippers for any damage not sustained or for which the shipper had not obtained protection under the rate charged. Again the so-called "question" is one which the I.C.C. has full power and

* If the shipment had been totally destroyed, there would be no question about the shipper's right to recover the full $20,000.00. Obviously, the rate charged would be identical in that situation and it is meaningless to state that the shipper received a $42.00 rate benefit because his shipment was not entirely destroyed.

authority to consider, and Allied's contention should be placed before that body and not be presented to this Court.

As a collateral point, Allied claims that a shipper may now violate 49 U.S.C. § 322(e) by stating a low declared value of a shipment and later asserting a higher value for the purpose of prosecuting a freight damage claim, thus obtaining an improper rate advantage by false representation. However, Congress in adopting 49 U.S.C. § 20(11) expressly provided that a declaration of value less than actual value would not be considered a violation of section 10 of the Interstate Commerce Act.* See *H.R. Rep.* No. 944 and *S. Rep.* No. 394, 64th Congress, 1st Session (1916). 49 U.S.C. § 20(11) expressly approves declarations of value less than actual value. So does the ICC, and so does Allied's bill of lading. A declaration by a shipper of less than actual value is entirely legal and could not result in unlawful rate preference in any way.

Finally, Allied treats the Court to a lengthy statistical review of freight claims, cites various ICC Released Rates Orders, and discusses the concepts of co-insurance and co-responsibility. (Pet Br. 11 et seq.) All of this is far beyond the record, and is obviously submitted in an effort to convince the Court that a small fire in Cochise County, Arizona, will bring rate chaos to the transportation world. The shipper takes no credit for such a monumental result, primarily because such a result does not exist.

All of the statutes involved in this action have the same meaning as they did before this case was brought. The Interstate Commerce Commission has no more and no less authority than it ever had. Allied Van Lines is apparently doing business as usual. In the final analysis, these are the results of the decision of the Court of Appeals.

*49 U.S.C. § 10 prohibits various falsifications for purpose of giving or obtaining reduced shipping rates.

II. The Court Should Not Grant Certiorari to Consider the Proper Interpretation of Allied Van Lines' Bill of Lading.

When this case is stripped of the complexities, which Allied would superimpose by the semantics involved in concepts of "co-insurance" and "co-responsibility" for damage to interstate shipments, the only dispute is the proper interpretation of Section 1(b) of the bill of lading issued by Allied.

The opinion of the Court of Appeals on this point is worthy of quotation:

> "It is to be noted that Section 1(b) of the bill of lading sets forth only one method for the computation for loss on each article in the shipment and that is by the application of a uniform method, i.e., the liability for loss or damage to each article shall be limited to a proportion of the declared value of the entire shipment, *represented by the percentage which the full actual value of the lost or damaged article bears to the full actual value of the entire shipment, if the value so declared by the shipper is less than the full actual value of the shipment.* (Italics ours.) The section does not state that an alternative method may also be used, i.e., actual damage or loss to an article, when such loss or damage is less than the amount produced by the application of the percentage derived from the formula. Appellee justifies the use of the alternative method on the ground that to permit the 'formula recovery' in respect to such article would result in unjust enrichment to the shipper in those instances wherein 'formula recovery' exceeds actual damage. We are not impressed by the unjust enrichment argument in this case since it appears appellant's loss on the entire shipment exceeds the declared value of $20,000.00." (Pet. Br. 22.)

In the light of this opinion, the entire problem of which Allied complains could be solved by Allied's clarification of

the language of the bill of lading so as to specify that an alternative method of computing damage would be used in certain circumstances. If this were done, there would then be no question as to whether the bill of lading provided for coinsurance (or co-responsibility) as Allied would understand it. Thus, Allied's petition for certiorari is actually founded on the notion that the bill of lading should be rewritten by this Court so as to define what Allied wants the bill of lading to mean, but what the Court of Appeals said it did not mean.

CONCLUSION

Allied's brief in support of the petition for certiorari is a classic example of abstract logic ignoring the realities of this litigation. More important, Allied has not demonstrated that the Court of Appeals committed any error, misconstrued any federal law, or passed upon a question of real consequence. On the contrary, Allied is concerned solely with Allied's interpretation of the Ninth Circuit's opinion.

The petition for certiorari contains nothing of substance which would justify review under Rules of this Court, U.S. Sup. Ct. Rule 19, 28 U.S.C. Respondent submits that the Court has no alternative to do other than refuse the issuance of a writ of certiorari herein.

Respectfully submitted,

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